Supreme Court, U.S.
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No. 96-1987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NIPPON PAPER INDUSTRIES CO., LTD.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR THE PETITIONER

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

No. 96-1987

Nippon Paper Industries Co., Ltd.,

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

This case raises serious issues of federal law that present compelling reasons for prompt review by this Court. Without any textual support, the First Circuit's unprecedented opinion defines the criminal scope of the Sherman Act so broadly that it impinges upon the sovereignty of, and invites retaliation against American companies from, important United States trading partners.[1] The decision also conflicts

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[1] Petitioner respectfully refers the Court to The Brief of Amicus Curiae the Government of Japan, in support of this petition (filed July 17, 1997).

with important, long-standing precedents of this Court -- *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) and *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) -- and misapplies this Court's more recent decisions in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), and *Ratzlaf v. United States*, 501 U.S. 135 (1994). The decision denies due process by forcing petitioner to stand trial for conduct that it could not reasonably foresee would give rise to United States criminal penalties, and permits the Justice Department to expand the scope of a criminal statute on the books for 107 years merely by issuing a policy statement. Moreover, the First Circuit's opinion casually sweeps away the historical distinction between criminal and civil interpretive rules that has been fundamental in adapting the Sherman Act to meet 107 years of changing business practices.

The government's response to these important federal issues is to ignore them. The government argues that the petition should be denied, not because it claims the issues the petition raises lack importance but because the underlying order is "interlocutory" and because there is no circuit split. While these arguments might have merit in other circumstances, they are inapplicable here, and therefore should be accorded no weight.

1. As a threshold matter, the government's use of the term "interlocutory" is inapposite and misleading; clearly the government does not mean that this case involves a non-final, non-appealable order within the meaning of 28 U.S.C.

§ 1291 (1994).[2] The district court's dismissal of the indictment was appealable to the First Circuit and this Court without doubt has the authority to review the First Circuit's decision. Though the government uses confusing terminology, it does not claim otherwise.

2. When the dust settles, the government appears to be arguing that this case, although final for purposes of review by this Court, is tantamount to an "interlocutory order" under § 1291 because the First Circuit's reversal of the district court clears the way for a trial that could obviate the need for Court review altogether, or could allow petitioner to file a post-trial petition. In essence, the government asks this Court to refuse to review a petition that presents serious federal issues simply because there has been no acquittal or conviction of the defendant.

That proposition cannot withstand scrutiny. Over a century of the Court's practice is to the contrary; certiorari has been granted frequently in the very circumstances presented here. Each such case would have been subject to the same objections the government advances in its opposition -- that petitioner might moot the issue by prevailing at trial or, if not, could present all issues in a single post-trial petition. *See, e.g., Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) (reviewing the court of appeals' reinstatement of an indictment in the face of alleged

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[2] 28 U.S.C. § 1291 states: "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

errors in grand jury proceedings); *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978) (reviewing court of appeal's reinstatement of indictment charging petitioner with violating an environmental regulation); *Witte v. United States*, 515 U.S. 389 (1995) (reviewing court of appeal's rejection of petitioner's double jeopardy claims in reinstatement of indictment); *Wayte v. United States*, 470 U.S. 598 (1985) (reviewing rejection of petitioner's selective prosecution claims in reinstatement of indictment); *Serfass v. United States*, 420 U.S. 377 (1975) (reviewing court of appeal's rejection of conscientious objection and prejudice claims in reinstatement of indictment).

3. Moreover, in entertaining petitions where there has been no final adjudication on the merits, the Court has fashioned a distinction between those cases that raise issues collateral to the merits (such as jurisdictional challenges), where immediate review is generally allowed, and challenges that involve issues implicating the guilt or innocence of the petitioner, which warrant deferral until after a trial. That distinction counsels for immediate review here.

For instance, in both *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) and *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949), the "Supreme Court consented to review decisions raising important jurisdictional questions where the court of appeals had reversed the granting of a motion to dismiss and had ordered the case remanded for trial." Robert L. Stern, et al., Supreme Court Practice § 4.18, at 196-97 (7th ed. 1993). Similarly, in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938), the Court granted certiorari to review the affirmance

of a preliminary injunction where "there was an insuperable objection to the maintenance of the suit in point of jurisdiction and where it clearly appears that the decree was the result of an improvident exercise of judicial discretion." *See also FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 466 (1984) (dismissal on jurisdictional grounds reversed and the Court "granted certiorari, to decide whether the District Court could exercise jurisdiction over [petitioner's] ultra vires claim"); *Cory v. White*, 457 U.S. 85, 88 (1982) (dismissal for lack of subject matter jurisdiction reversed and the Court granted certiorari "because of the troubling issues involving federal-court jurisdiction in [interpleader] disputes").

These cases are indistinguishable from this one. Nippon's petition raises no issue bearing on whether the company engaged in the conduct charged; the sole issue presented is whether Congress intended to permit the Executive Branch to bring criminal charges against foreign actors when the alleged conduct is wholly foreign.

4. There is another line of cases that also supports immediate review in this case: the Court's grants of certiorari in cases involving the "collateral-order" exception to 28 U.S.C. § 1291. While, as emphasized, the order in this case is "final" for purposes of appeal to this Court, unlike a collateral order which is subject to review only under an exception to the final judgment rule, the Court's analysis in such cases provides another basis to grant certiorari. In the two seminal cases involving the collateral-order doctrine, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and *Abney v. United States*, 431 U.S. 651

(1977), the Court looked to three criteria to determine whether an order was immediately appealable.

First, the Court considered whether the disposition below constituted final rejection of the petitioners' claims or whether it was merely a step toward final judgment, warranting postponement of review until after trial. In both *Cohen* and *Abney*, the Court concluded that immediate review was appropriate because "there [were] simply no further steps that [could] be taken in the District Court to avoid the [action] the defendant maintains is barred . . . ." *Abney*, 431 U.S. at 656.

Second, the Court considered whether the claim was collateral to the issue to be resolved on the merits such that there was no justification for postponement of review. In both cases, the issues were found to be severable because the claim was "not an ingredient of the cause of action and [did] not require consideration with it." *Cohen*, 337 U.S. at 546-47. Rather, petitioner was "contesting the very authority of the Government to hale him into court to face trial on the charge against him," *Abney*, 431 U.S. at 659.

Finally, the Court asked whether the rights of the petitioners would be "significantly undermined," *Abney*, 431 U.S. at 660, if appellate review were postponed due in part to the fact that they would be subjected to the burdens of trial.

These criteria easily are met here. As in the collateral order cases, the First Circuit's decision that the Sherman Act extends to alleged wholly foreign conduct solely by foreign actors clears the way for a trial on the merits. Moreover,

petitioner is challenging the "very authority of the Government to hale him into court." *Abney*, 431 U.S. at 660. The issues presented by this petition are totally independent of, and can be decided without any development of, the underlying facts. Finally, denying review would "significantly undermine" petitioner's rights because it would expose the company to a trial that may very well be unjustified in the first instance, as the district court held. *Id.* at 660. Clearly, the procedural posture of this case should not preclude Supreme Court review of the important substantive issues raised by this petition.

5. The Court's willingness to entertain petitions involving claims of immunity also undermines the government's bid to delay scrutiny of its unprecedented application of the Sherman Act. Immunity claims, like Nippon's claim here, challenge the authority of a court to adjudicate the underlying case. As with jurisdictional challenges, the Court has often granted certiorari in immunity cases because immunity is an entitlement not to face trial -- a right that obviously is lost if review is delayed until after trial. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Wood v. Strickland*, 420 U.S. 308 (1975); *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

A challenge to the extraterritorial application of the Sherman Act likewise implicates the authority of the government to bring petitioner to trial. If, as Nippon contends and the district court found, the law does not apply to foreign conduct, then an important right -- the right not to

stand trial in the absence of a statute making the alleged conduct criminal -- is lost by delaying review.

6. The absence of a circuit split also does not counsel against review. An essential component of petitioner's claim is that the government took a radical step when it indicted a foreigner for alleged wholly foreign criminal conduct. The indictment has no precedent anywhere in the Sherman Act's history. In such circumstances there cannot, by definition, be a circuit split. Moreover, there is good reason to believe that a split may never develop. As this Court has recognized, the government can shop for favorable jurisdictions. *See Parr v. United States*, 351 U.S. 513, 523 (1956) (Warren, C.J., dissenting) ("the Government can and probably frequently does shop around to find a court it deems most favorable to try defendants" and noting that for 20 years, the Government tried tax-evasion cases in one jurisdiction only to switch to another after an adverse court ruling). The government has virtually unlimited power to select its forum of choice in Sherman Act prosecutions of alleged offenses by foreign corporations outside the United States that allegedly had effects here.[3] The First Circuit's

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[3] So long as service can be effected anywhere in the United States and the defendant has minimum contacts with the United States as a whole and the exercise of jurisdiction is reasonable, virtually any district court will be able to exercise personal criminal jurisdiction over the defendant. *See* Fed. R. Civ. P. 4(d)(2) (permitting nationwide service of a criminal summons). The venue requirements could also be met through the "continuing offense" doctrine, 18 U.S.C. § 3237, which permits

unprecedented decision may thus, as a practical matter, become the law of the land. If the Sherman Act's criminal provisions are going to be interpreted as reaching wholly foreign conduct, thus infringing upon the sovereignty of other nations, it should be the Supreme Court, not the First Circuit, that determines whether this was truly Congress' intent.

7. The absence of a circuit split pales in importance where, as here, a "United States Court of Appeals has decided an important federal question . . . in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Such is the case here. The First Circuit's decision conflicts with at least two Supreme Court precedents. The first is *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), in which Justice Holmes wrote that Section One of the Sherman Act did not cover actions that took place entirely in a foreign country, even when those actions were undertaken by subsidiaries of American companies. Justice Holmes reasoned that entirely foreign conduct "obviously" could not be criminalized under the Sherman Act and could therefore not be subject to treble damages in a civil action. While *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) suggests that wholly foreign conduct can be the subject of civil proceedings, no decision by this Court has ever overruled *American Banana* with regard to the applicability of criminal sanctions to such conduct. The First Circuit decision, in effect, takes that step -- a decision

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prosecution in any of the districts in which the offense was begun, continued or completed.

only this Court can make. *See Augustini v. Felton*, No. 96-552, ____ U.S. ____ (June 23, 1997).

The First Circuit decision is equally at odds with *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), where the Court rejected the notion that long-standing civil precedents *ipso facto* govern parallel criminal applications of the Sherman Act. The First Circuit's holding that it was bound by *Hartford Fire* (a civil case) in ruling on the scope of the Sherman Act in this criminal case is contrary to *Gypsum* and to an age-old tradition of interpreting the Sherman Act differently in civil and criminal cases.

CONCLUSION

The government fails to advance a valid reason to forestall review of the First Circuit's wholesale restructuring of the Sherman Act. For the reasons stated in Nippon's Petition for Writ of Certiorari, the petition should be granted.

Respectfully Submitted,

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